Laborers' International Union of North America, AFL–CIO, Local Union 860 *and* Anthony Allega Cement Contractor, Inc. Case 8–CD–480

September 28, 2001

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

The original charge in this Section 10(k) proceeding was filed April 5, 2001, by Anthony Allega Cement Contractor, Inc. (the Employer), and an amended charge was filed on April 27, 2001, alleging that the Respondent, Laborers' International Union of North America, AFL–CIO, Local Union No. 860 (Laborers or Local 860), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Brotherhood of Electrical Workers, Local No. 38, AFL–CIO (Local 38). The hearing was held May 9 and 10, 2001, before Hearing Officer Karen N. Nielsen.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error.[1] On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Ohio corporation with an office and place of business in Valley View, Ohio, is engaged in highway and heavy utility construction. During the preceding 12-month period, the Employer, in conducting its business, performed services valued in excess of $50,000 in States other than the State of Ohio. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 860 and Local 38 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

In August 2000, the City of Cleveland, Ohio, through its Port Authority, solicited bids for the construction of a new runway (5L–23R) at Cleveland Hopkins International Airport (CHIA) together with the construction of electrical volt buildings, new storm and sewage systems, and for the relocation of Brookpark Road. The project involves, among other things, the construction and installation of underground duct banks and manholes. Duct banks are groups of conduits, typically made of polyvinyl chloride (PVC), which are laid together and through which electrical, fiber optic, and other communication wires or cables are run. The installation of duct banks begins with the excavation of a trench 7–9 feet below grade. The duct banks are assembled above ground in 20-foot lengths by joining together the PVC pipes into plastic grids called "spacers," which keep the conduit evenly and sequentially spaced. The assembled lengths of duct bank are placed into the trench using a backhoe and are then glued together. At periodic intervals, duct bank runs connect to an underground manhole, which provides access to the wires and cables. As the duct bank is assembled, it is encased in concrete and the trench is backfilled with surface dirt.

After several thousand feet of duct bank is laid and the trench has been backfilled, a steel sleeve or liner is sent

[1] Some of Local 38's exceptions imply that the hearing officer's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's report and the entire record, we are satisfied that Local 38's contentions are without merit.

In particular, we reject Local 38's contention that the nature and extent of the hearing officer's examination of its sole witness, Richard Newcomer, is evidence of bias on her part. Sec. 10210.5 of the Board's Case Handling Manual provides that, in conducting a 10(k) hearing, "the hearing officer should see that the Board gets a complete record, including evidence as to whether there exists reasonable cause to believe that the respondent has violated Section 8(b)(4)(D) of the Act." We are satisfied that the hearing officer's questions were within the scope of her responsibilities as set forth above.

Local 38 additionally asserts that the notice of hearing should be quashed because the Region erred in failing to serve it with a copy of the original charge in this case and in its scheduling of the hearing. There is no evidence that Local 38 was served with a copy of the original charge, which was filed on April 5, 2001 (Local 38 is a party in interest in this proceeding and was not the charged party). However, the Region did serve Local 38, on April 20, 2001, with a notice of hearing scheduling a 10(k) hearing for May 1, 2001. Thereafter, an amended charge was filed on April 27, 2001, and served the same day on Local 38 by regular mail. A notice of hearing also served on April 27 set the date for the 10(k) hearing as May 3, 2001. When Local 38 complained that the Region had failed to provide the required 10-day period between the date of the charge and the date of the hearing, the hearing was rescheduled to May 9, 2001.

It is evident from the foregoing that Local 38 was timely served with a copy of the amended charge and that the 10(k) hearing ultimately was scheduled with sufficient notice. Local 38 has failed to show that it was prejudiced in any way by the apparent failure to serve it with a copy of the original charge, or by the Region's having at one point in this proceeding scheduled the hearing for May 3. Although counsel for Local 38 avers that he had advised the Region that he would be unavailable on May 9 prior to the Region's scheduling the hearing for that date, there is no evidence that he filed a motion to postpone the hearing or that Local 38 was prejudiced by the date selected. Moreover, Local 38's counsel attended and participated fully in the hearing. For all of the foregoing reasons, we deny the motion to quash the notice of hearing.

through each pipe in the duct bank in a process called "rodding" or "proofing." This ensures that the duct banks are true and straight. A pull rope is then blown through each pipe from one manhole to the next. The pull rope is used to pull the wire and cabling through.

The Runway 5L–23R project also involves the installation of runway lights, which are powered by electrical wires run through conduit laid in underground trenches. These trenches are shallower than those used for duct banks and are interspersed with "handholes" rather than manholes. The conduit involved consists of single or double lengths of pipe laid directly in the ground without the use of spacers. These lines are connected to cans which house the individual runway lights.

On about August 5, 2000, the Cleveland Electrical Labor Management Cooperation Committee (LMCC)[2] sent letters to each general contractor bidding on the Runway 5L–23R project which stated the following:

> On behalf of the Electrical Construction Industry, we want to insure that the electrical work to be performed at Cleveland Hopkins International Airport will be accomplished by proper assignment and with the payment of prevailing wages for all work so assigned (See attached sheet for the prevailing wage of electricians in Cuyahoga County). Work should include, but not be limited to, Electrical Conduits, Duct banks, manholes, and should closely follow Part C—Supplemental General Condition (Page C.23 of 53 Attached). The Contractors shall assign work based solely in accordance with the local customs, rules, and jurisdictional awards.

This letter was signed by Local 38 Business Manager Salvatore (Sam) Chilia and Cleveland NECA Executive Director R. L. Newcomer, with their respective titles.

On August 17, 2000, Local 38, by its legal counsel, wrote to the City of Cleveland purchasing department to protest the city's failure to affirmatively state whether bidders on the Runway 5L–23R project were required to pay the electricians' prevailing wage rate for duct bank work. Local 38 threatened to take legal action if the work was awarded to a contractor intending to pay an "incorrect rate."

On November 17, 2000, while its bid was pending, the Employer wrote to Local 860 to advise it that when it was awarded the Runway 5L–23R project, it would "award all labor work to Laborers Local 860" including but not limited to "the construction and installation of electrical conduit, duct bank systems and electrical manholes." In contrast, the Employer assigned the following work to electrical contractors: the pulling of electrical cable through the pipes in the duct banks, the actual electrical hookups of all cables, and the laying of single and double conduit lines and attendant can connections for the runway lights.

On December 11, 2000, Local 38 wrote to the City of Cleveland Port Authority to reiterate its position that the electrician prevailing wage rate should be used for the work of installing underground conduit and setting manholes. The letter further stated that "IBEW Local 38 electricians have customarily installed the work in question and there is no doubt should be awarded the work on runway 5L–23R."

On February 24, 2001,[3] the Employer was notified that it had been selected by the Port Authority as the successful bidder on the Runway 5L–23R project. The total value of the contract exceeds $120 million. On March 14, the Cleveland City Council enacted Ordinance No. 454–01 which, inter alia, required the Port Authority to ensure that "all electrical work, including but not limited to duct bank and manhole placement and/or construction, to be performed on the runway [5L–23R] construction project . . . is done by licensed, registered electrical contractors .. . and that the wages to be paid .. . shall be established at the applicable electrician prevailing wage rate."[4]

In response to these events, by letter dated March 19, the Employer confirmed in writing a prior offer to replace two Local 860 employees "with two (2) Local 38 electricians. . . . The only work to be performed by these two electricians is to glue and connect together the duct bank." On April 2, the Employer wrote to Local 860 to advise them of the compromise offer to displace two Laborers with two Local 38 electricians. Local 860 responded by letter, also dated April 2, restating its claim to the duct bank and manhole placement work. The letter also stated that "You are advised that Laborers Local 860 intend [sic] to exercise any and all legal means necessary to preserve its proper work jurisdiction at the Cleveland Hopkins International Airport project, including, if necessary, picketing, concerted and protected job slowdown, and striking."

At the request of the City of Cleveland, representatives of Local 38, Local 860, the Employer, and the City met with a mediator in mid-April in an effort to resolve the dispute. The mediator asked if the parties would agree at that time to go back to the earlier proposal of two electri-

[2] LMCC is a nonprofit Ohio corporation organized as a labor-management cooperation committee under the authority of Sec. 302(c)(9) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(9), with a Board of Trustees composed of an equal number of representatives of Greater Cleveland Chapter National Electrical Contractors' Association (Cleveland NECA) and Local 38.

[3] Unless otherwise noted, all dates hereafter are in 2001.

[4] At the time of the hearing in this case, the ordinance had been repealed by the Cleveland City Council.

cians to replace two laborers as the basis for a settlement. Although the Employer agreed, neither of the two unions accepted the proposal.

On about April 23, Local 38 Business Manager Chilia telephoned John Allega, the Employer's president concerning the use of electricians on the Runway 5L–23R project. Allega testified that Chilia "asked couldn't we resolve this problem, couldn't he get his people working out here and do this work."[5] Allega refused, stating that the matter was now "out of his hands" because he had filed a charge with the Board.

On April 25, Local 38 Business Manager Walter O'Malley filed a taxpayer lawsuit in his own name against the City of Cleveland seeking to enforce Ordinance No. 454–01 by, inter alia, requiring the City to "immediately utilize electricians and electrical contractors to perform all electrical duct bank and manhole handling, assembly, and installation work on the CHA Runway Expansion Project." At the time of the hearing in this case, the lawsuit was still pending.

B. Work in Dispute

The disputed work involves duct bank and manhole placement and/or construction to be performed on the Runway 5L–23R construction project at Cleveland Hopkins International Airport.[6]

C. Contentions of the Parties

Local 38 contends that there is no jurisdictional dispute here because it did not make a claim to the work in question. To the extent that the Employer is required by the City of Cleveland to utilize an electrical contractor to perform the disputed work, Local 38 contends that its efforts to insure compliance with those requirements are not cognizable competing claims but are instead owner's requirements which the Board is without authority to review.[7] Local 38 also argues, in effect, that the LMCC letter and the O'Malley lawsuit do not establish the existence of a cognizable competing claim because there is no basis for attributing them to the Union. Finally, Local 38 asserts that the notice of hearing should be quashed because there is no evidence that Local 860 has threatened to use proscribed means to enforce its claim to the disputed work.[8]

The Employer and Local 860 contend that a jurisdictional dispute exists, based on both unions' claims to the work and the Laborers' threat to strike in support of its claim. They assert that Local 38 has engaged in a longstanding campaign to obtain the duct bank work for its members, including demands for the same work on prior CHIA projects. Although recognizing that some of Local 38's demands for the work were addressed to the City of Cleveland, they argue that "a dispute cognizable under Section 8(b)(4)(D) may exist even though no demand has been addressed to the employer whose employees are performing the work."[9] They further assert that *Capitol Drilling* is distinguishable because in this case Local 38 has sought the assignment of the disputed work to employees it represents in addition to any claims it may have against the City of Cleveland.[10] In particular, they note that Local 38, through its business agent, Sam Chilia, directly sought assignment of the disputed work in a phone call to Allega on about April 23.

The Employer and Local 860 further assert that an award in favor of employees represented by Local 860 is justified by Local 860's collective-bargaining agreement, employer preference, past practice and area practice, skills and training, and economy and efficiency of operations.

D. Applicability of the Statute

In a proceeding under Section 10(k) of the Act, "the Board carries out its mandate of protecting employers

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[5] On cross examination, Allega was asked about the conversation and testified as follows:

> Q. Okay. But during that conversation, other than talking about the interpretation of the ordinance and the conversations and mediation and settlement presses [sic] that went on with Attorney Garafoli, at any time did Mr. Chilia say to you, "Mr. Allega assigned that work to us, the electricians?" He never said that, did he?
>
> A. He never said assign the work to them, no.

[6] Local 38 refused to stipulate to a description of the work in dispute on the grounds that there was no work in dispute. Near the end of the hearing, the Employer and Local 860 stipulated that the work in dispute was the following:

> The unloading, stockpiling, and inventorying of all conduit, manholes, and handholes; the construction, placement, and assembling of all duct banks, manholes, and handholes; the encasement and backfilling of all duct banks, single and double conduit, manholes, and handholes; the rodding and proofing of all duct banks; and the installation of pull ropes through all duct banks.

We find that this stipulation does not accurately describe the work in dispute as there is no evidence that IBEW Local 38 has disputed the assignment of work other than duct bank and manhole placement and/or construction as described above. Accordingly, we shall rely upon the description of the work in dispute stated in the notice of hearing, which is set forth above. See *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670, 672–673 (1985).

[7] Local 38 cites *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995) (union's efforts to enforce lawful union signatory subcontracting clause against general contractor does not, without more, constitute a claim to the work being performed by a subcontractor's employees).

[8] Local 38 presented no evidence concerning the merits of this dispute.

[9] *Longshoremen ILWU Locals 8 & 40 (Port of Portland)*, 233 NLRB 459, 461 (1977) (union's demands for assignment of disputed work made to port authority, rather than to employer performing work at port sufficient to establish competing claim).

[10] The Employer additionally contends that *Capitol Drilling* was wrongly decided and should be overruled.

and the public from the detrimental economic impact of jurisdictional disputes by assuring, to the extent possible, a permanent resolution of those disputes."[11] It is well settled that the standard in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. It requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim to the work in dispute, that there are competing claims to the disputed work between rival groups of employees, and that no method for the voluntary adjustment of the dispute has been agreed on.[12]

The parties have stipulated that there is no agreed-upon method to adjust the dispute voluntarily. The record further establishes that Laborers Local 860 threatened the Employer with picketing and striking if the disputed work was assigned to employees represented by IBEW Local 38. As noted above, Laborers Local 860 threatened, in its April 2 letter to the Employer, "to exercise any and all legal means necessary to preserve its proper work jurisdiction at the Cleveland Hopkins International Airport project, including, if necessary, picketing, concerted and protected job slowdown, and striking."

IBEW Local 38 contends that the Laborers' threat was a sham because the Laborers only threatened to use "legal means" and because the Laborers' collective-bargaining agreement contained a no-strike clause. There is no merit to these contentions. It is well settled that a threat to engage in a jurisdictional strike is not negated by the existence of a no-strike clause in an applicable collective-bargaining agreement.[13] Moreover, a threat to engage in concerted or other activity to force or require an employer to reassign disputed work violates Section 8(b)(4)(D).[14] The Laborers' characterization of its threat as involving "legal means" therefore does not affect our finding that there is reasonable cause to believe that the Laborers has threatened the Employer with picketing and/or a strike if the disputed work is reassigned.

We also reject Local 38's further contention that there are no competing claims to the work because it has never made any demand upon Allega for any assignment of work. Local 38's December 11, 2000 letter, to the Cleveland Port Authority asserting, inter alia, that "IBEW Local 38 electricians have customarily installed the work in question and there is no doubt should be awarded the work on runway 5L–23R," and Chilia's April 23 request "couldn't we resolve this problem, couldn't he get his people working out here and do this work" establish reasonable cause to believe that there are competing claims to the disputed work.[15] Contrary to Local 38, its December 11, 2000 letter, constitutes a claim for the work even though it was not directed at the Employer.[16] Moreover, Chilia's April request for the reassignment of the disputed work to Local 38 electricians, which was made directly to Allega, further establishes the existence of competing claims.[17]

[11] *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 941 (1989).

[12] *Glass Workers (Olympian Precast, Inc.)*, 333 NLRB No. 16, slip op. at 3 (2001).

[13] *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984).

[14] *Brockton Newspaper Guild (Enterprise Publishing)*, 275 NLRB 135, 136 (1985).

[15] We find it unnecessary to pass on whether the remaining acts and conduct on the part of Local 38, cited by the Employer and Local 860, also constituted cognizable claims for the disputed work.

[16] See, e.g., *Port of Portland*, supra, 233 NLRB at 461.

The December 11 letter was introduced into evidence by the Employer as an attachment to the verified complaint filed by Local 38 Business Manager O'Malley in his taxpayer lawsuit described above, over the objection of Local 38's counsel, who asserted that the complaint and its attachments had not been properly authenticated. In its brief, Local 38 renews its objection to the admission into the record of these documents. These contentions are without merit.

Federal Rule of Evidence 902 provides, in pertinent part, that "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, . . . or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution." The O'Malley complaint is stamped with the seal of the clerk of the Cuyahoga County Court of Common Pleas and contains the attesting signature of a deputy clerk certifying that the document is a true copy of the complaint filed in *O'Malley v. White* et al., Case No. 436947. The complaint includes an averment that the December 11 letter was sent by O'Malley to the Port Authority's Executive Director, Rueben Sheperd. Attached to the complaint is a notarized verification by O'Malley that the allegations in the complaint are "true and accurate to the best of his knowledge." The attorney who filed the O'Malley lawsuit also represents Local 38 in this proceeding and appeared on Local 38's behalf at the hearing. We find that the O'Malley complaint and its attachments were properly admitted into evidence.

[17] The Board need not rule on the credibility of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated. *Electrical Workers IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998). Accordingly, Allega's testimony concerning this conversation establishes reasonable cause to believe that the statute has been violated, and his somewhat confusing testimony on cross-examination does not prevent the Board from proceeding under Sec. 10(k).

We also reject Local 38's contention that evidence concerning this conversation was inadmissible under Federal Rule of Evidence 408 as evidence regarding settlement discussions. Rule 408 generally precludes the admission of an offer to settle a disputed claim, or evidence of conduct or statement made during settlement discussions, to prove liability for or invalidity of the claim being settled or its amount. Local 38 asserts that this conversation should be regarded as settlement discussion because it purportedly was part of the mediation process conducted in a lawsuit Local 38 Business Representative O'Malley filed against the City of Cleveland to enforce a City ordinance concerning duct banks and manhole construction at the airport. O'Malley filed his

Capitol Drilling,[18] cited by Local 38, is inapplicable to this case. *In Capitol Drilling*, the Board held that a union's action through a grievance procedure to enforce an arguably meritorious claim against a general contractor for breach of a lawful union signatory clause does not, without more, constitute a claim to the work being performed by a subcontractor's employees. The Board relied on the fact that there were two disputes in that case, one regarding the actions of the general contractor, and one involving the actions of the subcontractor who ultimately had assigned the work to a specific group of employees. The Board quashed the notice of 10(k) hearing, noting that the union which had filed the grievance against the general contractor on a contractual issue had not thereby made a competing claim directed at the subcontractor. Id. at 810–811 fn. 4. Here, there is only one employer involved and Local 38 and Local 860 have each attempted to establish a claim to the disputed work assigned by that employer.[19]

In light of the foregoing, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification(s) and collective-bargaining agreement(s)

There is no evidence of any Board certifications concerning the employees involved in this dispute.

The Employer has adopted the terms and conditions of employment set forth in the 1989–1992 Ohio Highway-Heavy Municipal and Utility Construction State Agreement negotiated between Laborers District Council of Ohio and the Ohio Contractors Association Labor Relations Division, and any successor agreement. Article I of the most recent agreement, which is effective by its terms from May 1, 1999, to May 1, 2001, provides that it shall cover, inter alia, "Airport Construction" and "Sewer, Waterworks and Utility Construction." "Airport Construction" is defined in article II as "including site preparation, grading, paving, drainage, fences, runway lighting, driveways, parking areas, and similar work incidental to the construction of airfields." "Sewer, Waterworks and Utility Construction" is defined in article II as "including construction of all . . . telephone and television conduit, underground electrical lines, and similar utility construction." Exhibit A of the agreement further recognizes the jurisdiction of the Laborers as including, and requires the assignment of all work to Laborers-represented employees which involves, inter alia, "Cutting of streets and ways for laying of conduits for all purposes, digging of trenches, manholes, etc., handling and conveying all materials for same, concreting of same, backfilling, grading and resurfacing of same and all other semi- and unskilled labor connected therewith." There was no evidence presented, in contrast, that the Employer has a collective-bargaining agreement with Local 38 covering the disputed work. The factor of collective-bargaining agreements accordingly favors an award of the disputed work to employees represented by Laborers Local 860.

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action as a taxpayer, however, and not in his capacity as a Local 38 representative. Thus, given that Local 38 was not a party to that action, it could not have been participating as a party in any mediation of the lawsuit. Furthermore, Local 38 has consistently taken the position that it has never made a competing claim for the work, and that there is "no dispute even ripe for NLRB consideration." Therefore Local 38 cannot assert that Business Manager Chilia's telephone conversation with John Allega was part of an effort to settle a dispute before the Board. Accordingly, we find that the conversation was not part of a settlement discussion, and therefore admission of evidence concerning this conversation is not precluded by Rule 408.

[18] Supra, 318 NLRB 809.

[19] See *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114–115 fn.6 (1998).

Chairman Hurtgen has previously stated his reservations regarding the Board's holding in *Capitol Drilling*. See, e.g., his concurring opinion in *Laborers Local 113 (Super Excavators)*, supra, 327 NLRB at 116. However, inasmuch as the instant case is distinguishable from *Capitol Drilling*, it is unnecessary for him to pass on the Board's holding in *Capitol Drilling*.

Member Truesdale notes that he dissented in *Capitol Drilling*. See 318 NLRB at 812–813. He agrees with his colleagues, however, that the circumstances of this case are distinguishable and that the holding from which he dissented in *Capitol Drilling* is not applicable here. See *Glass Workers (Olympian Precast, Inc.)*, 333 NLRB No. 16, slip op. at 3 fn. 4 (2001).

Member Walsh does not pass on the applicability of *Capitol Drilling*, as he does not rely on Local 38's letter to the Cleveland Port Authority to establish reasonable cause. He relies only on the April 23 conversation between Local 38 Business Manager Chilia and the president of Allega, which in his view is sufficient to establish reasonable cause to believe that Local 38 made a claim to the work in dispute.

2. Employer preference and current assignment

The Employer assigned the disputed work to employees represented by Laborers and prefers that the work in dispute continue to be performed by employees represented by the Laborers. Accordingly, this factor favors an award of the disputed work to employees represented by Local 860.

3. Area and industry practice

The evidence presented indicates that the Employer has consistently assigned the disputed work to employees represented by the Laborers in prior projects. Further, there is an unbroken area practice of Laborers performing the disputed work at CHIA in the past. Other employers, including Omni Electric, have also used employees represented by Laborers to perform duct bank and manhole work on projects at CHIA and other airports.[20] Accordingly, this factor favors an award of the disputed work to employees represented by Local 860.

4. Relative skills and training

Employees represented by Local 860 receive extensive training in soil classification and excavation safety, including training in confined space work required by OSHA for employees working in trenches. The evidence shows that employees represented by Local 860 are fully qualified by training or experience to perform the disputed work and have performed the work without difficulty in the past. There is no record evidence indicating whether employees represented by Local 38 have the specific skills and training required to perform the disputed work. Accordingly, this factor favors an award of the disputed work to employees represented by Local 860.

5. Economy and efficiency of operations

The Employer performs the installation of duct bank and manholes using employees represented by Operating Engineers Local 18 (Operating Engineers) to dig the required trenches using excavating equipment, while employees represented by Local 860 prepare the trench and assemble the duct bank into 20 foot sections. The duct bank sections are then placed in the trenches using a backhoe manned by employees represented by the Operating Engineers, who also place manholes in the trench. Employees represented by Local 860 then assemble the duct bank into continuous runs and, in conjunction with employees represented by the Cement Finishers, pour concrete into the trench in order to fully encase the duct banks.[21] The trenches are then backfilled with surface dirt by employees represented by the Operating Engineers using backhoes and proofed by employees represented by Local 860. Thereafter, electricians pull the cable through the pipes in the duct banks and perform the actual electrical hookups of all cables. However, the Employer does not directly employ electricians on its construction projects. Rather, when electricians are utilized, they are employed by electrical subcontractors. Because Local 38 only seeks a portion of the work involved in assembling and installing duct bank and manholes, assignment of the disputed work to employees represented by Local 38 would require the Employer to use a composite or mixed crew to perform work currently performed by employees represented by Local 860.

The Employer and Local 860 argue that it is more economical to use employees represented by Local 860 because they are paid less than employees represented by Local 38. The Board does not consider wage differentials as a basis for awarding disputed work.[22] We therefore do not rely on this argument in evaluating this factor.

On the basis of the foregoing facts, without reference to wage rate differentials, we find that this factor favors awarding the work in dispute to employees represented by Local 860.

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by Local 860 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, past practice and area practice, skills and training, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Local 860, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.[23]

[20] See also *Electrical Workers IBEW Local 9 (Omni Electric)*, 308 NLRB 513 (1992) (installation of highway lighting system including concrete work, underground electrical lines, and conduit, awarded to employees represented by Laborers).

[21] An employee represented by Local 860 operates a "vibrator" in the trench to ensure that the concrete pours properly.

[22] *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 452 (1998).

[23] The Employer and Local 860 have requested that the Board issue a broad, area-wide award of the disputed work to employees represented by the Laborers. We deny this request. Normally, 10(k) awards are limited to the jobsite where the unlawful 8(b)(4)(D) conduct occurred or was threatened. *U.S. Information Systems*, supra, 326 NLRB at 1385. The Board will issue a broad award when the dispute is likely to recur and when there is evidence that the union against which the broad order will lie will engage in further unlawful conduct in order to obtain work similar to that in dispute. *Laborers Local 76 (Carlson & Co.)*, 286 NLRB 698, 701 (1987). We conclude that a broad order is not warranted here. Local 38 did not engage in threats to picket or strike; rather, it was Local 860 that threatened to strike and picket to maintain assignment of the disputed work to employees it represents. Under

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Anthony Allega Cement Contractor, Inc. represented by Laborers Local 860 are entitled to perform duct bank and manhole placement and/or construction to be performed on the Runway 5L–23R construction project at Cleveland Hopkins International Airport.

these circumstances, there is no basis for extending the determination beyond the particular controversy that gave rise to the proceeding. Id. Accord: *Machinists Local 724 (Holt Cargo)*, 309 NLRB 377, 381 (1992), enfd. 30 F.3d 1487 (2d Cir. 1994).

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen,	Chairman
John C. Truesdale,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD